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BY E-FILING

**Bryan E. Mraz**

**Laurence J. Mraz**  
*Associate*

January 13, 2009

**Edward Smith Mraz**  
*Of Counsel*

The Honorable Anne K. Quinlan, Esq.  
Acting Secretary  
Surface Transportation Board  
Office of the Secretary  
395 E Street S.W.  
Washington, D C. 20423-0001

RE: STB Finance Docket No. 35087  
Canadian National Railway Company  
-Control-  
EJ&E West Company  
Petition for Stay of the Village of Bartlett, Illinois

Dear Ms Quinlan:

The undersigned as Village Attorney for the Village of Bartlett, Illinois (the "Village" or "Bartlett") herewith files the attached Petition for Stay of the Village of the Village of Bartlett, Illinois electronically Please note that Expedited Treatment is requested

Very truly yours,



Bryan E. Mraz  
Village Attorney  
Village of Bartlett, Illinois

BEM/amk

**EXPEDITED TREATMENT REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35087**

**CANADIAN NATIONAL RAILWAY COMPANY  
AND GRAND TRUNK CORPORATION**

**-CONTROL-**

**EJ&E WEST COMPANY**

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**PETITION FOR STAY OF THE VILLAGE OF BARTLETT**

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**Dated January 13, 2009**

**EXPEDITED TREATMENT REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**CANADIAN NATIONAL RAILWAY COMPANY  
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**EJ&E WEST COMPANY**

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**PETITION FOR STAY OF THE VILLAGE OF BARTLETT**

The Village of Bartlett ("Bartlett" or the "Petitioner") petitions the Surface Transportation Board (the "STB" or the "Board") to stay the effective date of its Decision No. 16 on the above-captioned proceeding<sup>1</sup> (the "Decision") pending ruling on any petitions for reconsideration, judicial review, and compliance with the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.* ("NEPA") Bartlett respectfully submits that the environmental review conducted in this case is fundamentally flawed and fails to comply with NEPA. Bartlett submits that it and many other communities on the approximately 198 mile EJ&E line, as well as the environment, will be irreparably harmed if a stay pending review is not granted, that neither the Canadian National Railway and Grand Trunk Corporation (collectively "CN" or the "Applicants") nor anyone

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<sup>1</sup> The "Decision" refers herein to Canadian Nat'l Ry Co and Grand Trunk Corp -Control-EJ&E West Co , STB Finance Docket No 35087 (hereinafter "Docket No 35087"), Decision No 16

else will be harmed if the stay is granted pending judicial review; and that a stay pending review is in the public interest.

Moreover, Bartlett is likely to succeed on the merits because of numerous fundamental flaws in the STB proceedings and the failure to comply with NEPA. First, the Board failed to consider all reasonable and feasible alternatives to the proposed action because it adopted, without any independent scrutiny or analysis, the Applicant's Statement of Purposes and Need for the proposed action as the Board's statement of purpose and need for the alternatives analysis. The wholesale adoption by the STB of the Applicant's Statement of Purpose and Need necessarily lead the STB's Section of Environmental Analysis ("SEA") in the Draft Environmental Impact Statement ("DEIS")<sup>2</sup> and Final Environmental Impact Study ("FEIS")<sup>3</sup> and in turn the Board to adopt an unreasonably narrow alternatives analysis, which was arbitrary and capricious and improper under NEPA. Given that the Board adopted all of the analysis and conclusions of the SEA, with few exceptions, the conclusions of the SEA in the DEIS and the FEIS are sometimes referred to herein as "conclusions of the Board". Under NEPA, the Board, and not the Applicants, bears the responsibility of defining at the outset the objectives of an action. *Citizens Against Burlington v. Busey*, 938 F2d 190, 195-196 (D.C. Cir. 1991). An evaluation of alternatives mandated under NEPA requires an evaluation of the alternative means to accomplish the general goal of the action, not an evaluation of the alternative means by which a particular applicant reaches his goals as was done in this case. See *Abbena v. Fomel*, 807 F2d 633, 638 (7<sup>th</sup> Cir. 1986). The

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<sup>2</sup> Draft Environmental Impact Statement for the Proposed Canadian Nat'l Ry Co Acquisition of EJ&E Ry Co., STB ID No. 39185, Docket No. 35087 ("DEIS")

<sup>3</sup> Final Environmental Impact Statement for the Proposed Canadian Nat'l Ry Co Acquisition of EJ&E Ry Co., STB ID No. 39515, Docket 35087 ("FEIS")

wholesale adoption of Applicants' narrow and self-serving statement of need and purpose ultimate resulted in the Board's flawed review of alternatives which it limited to (1) the No Action alternative, (2) the Proposed action, and (c) the proposed action with minor and largely voluntarily mitigation measures. Courts routinely condemn agencies that fail to engage in meaningful analysis of a true range of alternatives.<sup>4</sup>

Second, the Board failed to undertake a reasoned analysis of the environmental benefits of the proposed action, and its alternatives and environmental consequences. The Board has the statutory duty to compare the benefits and harms of the proposed action to the benefits and harms of all feasible alternatives in order to provide a clear basis for choice among options by the decision maker and the public (40 C.F.R. §1502.14). In this proceeding the Board assumed supposed environmental benefits without support in the record. NEPA requires the Board to evaluate and quantify the alleged environmental benefits, not merely accept the Applicants' blanket conclusions without analysis as the SEA and the Board did in this proceeding. For example, the SEA stated in the DEIS at 3-4-773 that it "did not examine the intent to which the Proposed Action would relieve rail congestion in the Chicago metropolitan area, nationally or internationally"; and yet in its Decision the Board stated repeatedly that the proposed action will benefit communities in the EJ&E arc with no factual support or independent analysis for such claim in the record other than the Applicants' unsupported conclusions. In fact, it is this unsupported claim of benefit upon which much of the Decision appears to rest, namely that the benefits of the proposed action outweigh the harms.

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<sup>4</sup> See *Simmons v. US Army Corps of Eng'rs*, 120 F.3d 644 (7<sup>th</sup> Cir. 1997), *David v. Mineta*, 302 F.3d 1104 (10<sup>th</sup> Cir. 2002), *Natl. Wildlife Fed'n v. Andrews*, 440 F. Supp. 1245 (A.D.C. 1977).

Third, the Board failed to evaluate all of the reasonably foreseeable environmental consequences of the proposed action as required by NEPA (Part I.A.1, at 19). For example, the Board failed to consider the likely possibility that the CN will choose to double track much of the EJ&E line<sup>5</sup>, or that the numerous railroads that currently operate in Chicago inside the EJ&E line, or that the numerous railroads that currently operate in Chicago inside the EJ&E arc, will simply fill in the newly created capacity on that portion of the line in a very short amount of time by simply changing their routines to fill in that additional capacity. Certainly nothing would prevent such action by the CN and other railroads, making both likely and probable outcomes, and yet the Board failed to consider the reasonably foreseeable environmental consequences of such likely occurrences.<sup>6</sup>

Fourth, the Board failed to properly consider and respond to numerous reasoned comments. For instance, the FEIS and the Decision fail to address deficiencies pointed out by the Village of Bartlett in its submittal to the DEIS. The Village of Bartlett pointed out several serious deficiencies in the Applicants' traffic analysis and submitted a traffic impact analysis prepared by Brent Coulter P.E. dated September 20, 2008 (the "Coulter Report") that evidences that the projected daily train/auto exposure cross product at the Stearns Road/EJ&E crossing will exceed the 1,000,000 criterion used by the SEA in the DEIS for grade separation consideration (EI-13816).

The Decision also failed to adequately address or mitigate impacts detrimental to public health and safety regarding the new Bartlett Fire Protection District Station No. 3

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<sup>5</sup> The fact that the EJ&E could double track today does not excuse the Board from its obligation to evaluate the environmental impact of the double tracking likely to occur because of the proposed action.

<sup>6</sup> See *Genville v. Peters*, 327 F. Supp. 2d 335 (D. Vt. 2004), *Midstates Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8<sup>th</sup> Cir. 2003).

(DEIS Table ES-2) While it is recognized as an "emergency services provider potentially substantially affected by the proposed action", the ordered mitigation measure requiring Applicants to install a video-monitoring (CCTV) system and warning dispatching center "to aid affected EMS providers along the full EJ&E line in anticipating when an at grade crossing may be blocked" (See Decision at 48-19, 77, Board's Final Mitigation Condition No. 18), the mere ability to see the crossing and when it will be blocked does not help avoid increased response time and loss of life that these drastically increased blockages will cause. No alternative highway/rail grade separation exists for a length of nearly seven miles (between U.S 20 in Elgin, Illinois and IL 64 in West Chicago, Illinois). (EI-13816) When the West Bartlett Road grade crossing is blocked by one of the 22.5 daily trains (an increase of over 400%+ with the proposed action) emergency vehicles will be unable to get to and provide crucial emergency services to the 5,000 plus residents that reside on the other side of the EJ&E tracks. (EI-13816) Through an Intergovernmental Agreement, the Village of Bartlett has paid more than \$3,000,000 for the BFPD Station No. 3.

Moreover, the Board failed to consider or address the comments from the US. Environmental Protection Agency (the "EPA") or the U.S. Department of Interior the ("DOI") on critical noise impacts.

#### Request for Expedited Consideration

Bartlett respectfully requests expedited consideration of this stay petition. Expedited consideration is appropriate given that the effective date of the Decision is January 23, 2009. Unless the stay is granted, numerous irreparable harmless will

occur, including irreversible harm to the environment that flow from the numerous violations of NEPA outlined above.

The Village of Bartlett, individually and as a member of The Regional Answer to Canadian National ("TRAC"), has or will be filing this same date its Petition for Review with the United States Court of Appeals for the District of Columbia (the "Federal Court"), and may in addition file a petition or motion for an Emergency Stay with the Federal Court shortly. Petitioner is likely to prevail on the merits because the Decision is arbitrary and capricious, and/or is otherwise not in accordance with law as set forth above. If the stay is not granted, the Petitioner and the other towns along the EJ&E line will be irreparably harmed given the Board's failure to comply with NEPA as outlined above, and the often irreversible effect on the environment if the Applicants are allowed to proceed.

Furthermore, CN would not be substantially harmed by the granting of the stay because the stay would not trigger a termination right of the Elgin, Joliet & Eastern Railway Company under its contract with the CN, and the CN can continue to operate its regular trains along all five lines into Chicago on its trackage rights during the pendency of judicial review and the subsequent proper review of the proposed transaction under NEPA.

Finally, the issuance of a stay by the Board pending full compliance with NEPA is clearly in the public interest of upholding environmental laws and in protecting the environment. The stay, if granted, will merely maintain the status quo pending judicial review and full NEPA compliance ensuring that the risks of harm to the environment have been identified and analyzed

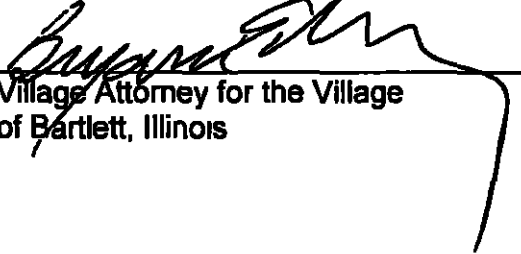
## **CONCLUSION**

The effective date of the Board's Decision No. 16 in the above captioned proceeding should be stayed pending judicial review and completion of the NEPA process. The Village of Bartlett has met the standards for a Board ordered stay as discussed above, and therefore respectfully requests that a stay be granted

Respectfully submitted,

VILLAGE OF BARTLETT

By, \_\_\_\_\_

  
Village Attorney for the Village  
of Bartlett, Illinois

Dated: January 13, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 13, 2009, I caused the foregoing Village of Bartlett's Petition for Stay to be served via first class mail, postage prepaid, or by a more expeditious method of delivery on all of the parties of record and on the following

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Bryan E. Mraz